1965

State of Utah v. Robert Wayne Gleason : Brief of Appellant

IN THE SUPREME COURT
of the
STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

vs.

ROBERT WAYNE GLEASON,

Defendant-Appellant.

Case No.
~~18467~~
10289

BRIEF OF APPELLANT

Appeal From the Judgment of the
Third Judicial District Court for Salt Lake County
Hon. Merrill C. Faux, Judge

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STATEMENT OF NATURE OF THE CASE

The appellant was charged for the crime of rape and carnal knowledge, and convicted upon jury trial of rape, from which conviction he appeals.

DISPOSITION IN LOWER COURT

The appellant was charged by information for the crime of rape in violation of 76-53-15, UCA (1953) and

for the crime of carnal knowledge in violation of 76-53-19, UCA (1953). He entered a plea of not guilty and not guilty by reasons of insanity. Upon jury trial in the Third Judicial District for Salt Lake County, before the Honorable Merrill C. Faux, Judge, the appellant was found guilty of rape and was committed to the Utah State Prison.

RELIEF SOUGHT ON APPEAL

The appelant seeks reversal of the conviction and a new trial.

STATEMENT OF FACTS

The State charges that on April 14, 1963, a Faun Dotson (Mrs. Faun Tillery at the time of trial), aged 17, was raped by the appellant, (R-1). The prosecutrix testified that on the night of April 14, 1963 at approximately 10:30 p.m. she was standing on the northeast corner of Thirteenth South and State Street in Salt Lake City, Utah, waiting to catch a bus in order to return to her mother's home in West Jordan. Prior to this time she had been visiting with her boyfriend at his home on Thirteenth South and Second East Streets where she had spent the day. (R-72,88). As she waited on the corner for the bus, the appellant struck up a conversation with her. He then thrust a hard object in her back, which she described as a gun, and demanded that she follow him. (R-78). Thereupon both proceeded to a nearby alley where

appellant assaulted her (R-25), removed her clothing, threw her to the ground and allegedly forced intercourse (R-79,80,81). Thereafter, Miss Dotson returned to the home of her boyfriend and the police were notified. After the arrival of the police she was taken to the Salt Lake County Hospital where she was examined by Dr. David A. Hansen (R-67) who testified that said examination indicated that the prosecuting witness had sperm implanted within her vagina within 48 hours of his examination (R-70).

Pursuant to the plea of "Not Guilty by reason of Insanity", the prosecution entered a "Petition for Examination as to Sanity". (R-3) On June 25, 1963 a hearing as to the sanity of the appellant was held at which time it was determined that the appellant was not competent to stand trial. Accordingly, he was committed to the Utah State Hospital to remain in custody until such time as he was competent to be tried (R-15,16). On July 17, 1964 the appellant was brought to trial (R-65).

During the course of the trial Dr. Richard C. Gilmore and Dr. Roger S. Kriger, psychiatrists who examined the appellant by order of the trial court (R-128), were called by the appellant to testify as to the mental condition of the appellant.Both testified that the appellant as of June 10, 1963, the date when he was committed to the Utah State Hospital, was grossly psychotic, delusional, and suffering from an acute schizophrenic reaction of a para-

noid type (R-119, 120, 129). During his direct examination Drfl Gilmore described such condition as follows:

> He had the delusion that he had to get out of the hospital first, before we killed him or the sheriff killed him, so he could do away with some person or persons, and he interpreted this as being his responsibility to society—to protect society. He was hallucinating and he was hearing voices. He was standing by the window and seeing people, of which he could not describe; and, by this, I mean he was grossly thought disordered, was unable to really give much history as to the difficulties in which he finds himself, but—that is what I mean by his being grossly psychotic. (R-119)

Neither of the doctors were able to form opinions concerning the mental condition of the appelant as of the date of the alleged commission of the offense (R-120,129). However, in answer to the question as to whether a mental condition such as appellant's development over a period of time, Dr. Gilmore answered: "It is my opinion that this would be possible." (R-121). On redirect examination Dr. Gilmore also testified that a person suffering under a mental condition such as that ascribed to appellant would not be capable of understanding the difference between right and wrong and would not be able to control his impulses (R-126). Dr. Kriger testified that in his opinion the appellant could, at the snap of a finger, revert to the mental condition described above (R-136) When asked whether the appellant on April 14, 1963 knew the nature

of forcing someone to have intercourse with him, Dr. Kriger answered: "I have never been in a position to know." (R-134). The answer of Dr. Gilmore to a similar question, i.e. whether appellant on April 14, 1963 knew the difference between right and wrong both leagally and morally was: "I could not testify to this, sir." (R-123)

Over the objection of the appellant, the trial court took from the jury the consideration of the plea, "Not Guilty by Reason of Instanity"; refused to grant appellant's requested instructions on that issue and advised jury to disregard entirely any evidence respecting said plea (R-34). The trial court also refused to include verbatim the language of 76-1-21 UCA (1964), 1953 (R-47,-140) and denied appellant's request that the jury be instructed with respect to the lesser included offense of "assault with intent to commit rape." (R-138). Other pertinent facts appear below.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN RULING AS A MATTER OF LAW THAT THE APPELLANT WAS SANE ON THE DATE OF THE ALLEGED COMMISSION OF THE OFFENSE.

The appellant does not dispute the proposition that it is incumbent upon the defense to come forth with evidence which must preponderate in favor of insanity in

order that the issue of insanity may be properly submitted to the jury. *State v. Brown,* 36 Utah 46, 58, 102 P. 641 (1909). The appellant's position is that the evidence submitted in support of the plea of not guilty by reason of insanity was sufficient to have that issue submitted to the jury.

In analyzing the evidence at trial, the court's attention is called to *State v. Brown,* supra wherein the court stated.

> If the state of the evidence upon the issue of insanity had been such as to *permit reasonable men to arrive at different conclusions* when considered in connection with the presumption of sanity, then the *question would be one of fact merely,* and we would be powerless to infer. *Id.* at 59. (emphasis added)

Also see *State v. Hadley* 65 Utah 109, 234, p 940 (1925); *State v. Hockett,* 238 p. 539 (Kan. 1951)

As to what quantum of evidence the accused must introduce, the case of *State v. Green* 78 Utah 580, 6 p. 177 (1931) is pertinent, wherein the court stated:

> The correct rule is that the presumption of sanity prevails only until such time as evidence is received at trial which *tends to show insanity* ... When the trial judge shall determine that there is *some* evidence which tends to show the accused

> was insane at the time of the alleged offense, then it becomes his duty to submit such question to the jury. *Id.* at 596. (emphasis added)

The foregoing rule is the prevailing rule in most jurisdictions. *Tatum v. U. S.*, 190 F. 2d 612, 615 (D. C. Cir. 1951). Two of the more recent cases which deal with this question require that only "slight" evidence of the accused's insanity at the time of the alleged commission of the offense is required to make such issue a question of fact. *Howard v. U.S.*, 232 F. 2nd 274, 276 (5th Cir. 1956); *Hurt v. U.S.*, 327 F. 2nd 978 (8th Cir. 1964).

When measured by the above rules and standards, it is clear that the evidence produced by the appellant in the case at bar pertaining to the issue of his insanity at the time of the alleged commission of the offense was of such character as sufficient to raise a question of fact thereby requiring the trial court to submit such question to the jury.

A consideration of the entire testimony of both Drs. Gilmore and Kriger is certainly sufficient to demonstrate that reasonable men could arrive at different conclusions on the basis of such testimony. Both doctors testified that on June 10, 1963, the date of their first examination of the appellant, he was grossly psychotic, delusional and sufferoing from an acute schizophrenic reaction of the paranoid type. While neither was able to testify that appellant was insane as of April 14, 1963, more import-

antly, neither was able to testify that he *was not insane* at that time. (R-120, 123, 129, 134) Furthermore, Dr. Gillmore's testimony that the mental condition under which appellant was suffering on June 10, 1963 could have developed over a period of time is, at the very least, evidence which tends to show that appellant was legally insane at the critical time.

When the appellant attempted to introduce the "Order Appointing Designated Examiners" and the attached report as evidence, the trial court erroneously excluded the same on the grounds that the information contained in such report was "too remote" from the issue involved in the case (R-122). The evidentiary value of the report lies in the fact that it contains critical evidence showing that appellant had a history of mental illness and received treatments therefor while serving in the U. S. Marine Corps approximately one and one-half years prior to the examination conducted in connection with the instant case. The treatments consisted of medication and electro-convulsive therapy which was administered at the naval hospital in Oakland, California (R-13). The report also shows that appellant suffered other "attacks." Such evidence is critical in demonstrating that the appellant had suffered from mental disorders prior to the time of the incident complained of in the case at bar, and becomes even more significant when viewed in connection with Dr. Kriger's testimony that the nature of appellant's mental illness was such that he could, at the "snap of a

finger," revert to te acute schezophrenic, delusional state he was in on June 10, 1963. All of this evidence considered together adequately falls within the language of *State v. Green,* supra.

The trial court's refusal to properly instruct the jury with respect to the necessity of finding a joint operation of act and intent in the crime charged as prescribed by 76-1-20 and 76-1-21 Utah Code Annotated, 1953, constituted error for the same reasons enumerated above.

These statutes read:

> 76-1-20. In every crime or public offense there must exist a union or joint operation of act and intent, or criminal negligence.
>
> 76-1-21. The intent or intention is manifested by the circumstances connected with the offense and the sound mind and discretion of the accused. All are of sound mind who are neither idiots, nor luatics nor affected with insanity.

It is clear that intent is an essential ingredient of the crime of rape and that the above statute defines intent in terms of "the sound mind and discretion of the accused." Intent must be shown before an act constitutes a crime, and intent cannot be shown without evidence of sound mind and discretion. *State v. Brown, op. cit.* at 58. Thus the trial court erred in failing to instruct the jury in accordance with the above statute.

POINT II

THE TRIAL COURT ERRED BY REFUSING TO INSTRUCT THE JURY WITH RESPECT TO THE LESSER INCLUDED OFFENSE OF "ASSAULT WITH INTENT TO COMMIT RAPE."

77-33-6 Utah Code Annotated, 1953 provides:

> The jury may find the defendant guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment or information or of an attempt to commit the offense.

In construing this statute this court has consistently held that when the evidence permits the trial court is under the obligation to instruct the jury with respect to any offenses included in the charged offense. *State v. Blythe*, 20 Utah 378, 58 P. 1108 (1899); *State v. Hyams*, 64 Utah 285, 286, 230 P. 349 (1924); *State v. Cobo*, 90 Utah 89, 103, 60 P. 2d 960 (1936); *State v. Smith*, 90 Utah 482, 495, 62 P. 2d 1110 (1936).

In the instant case, the trial court's refusal constitutes reversal error. The appellant surely requested an instruction on assault with the intent to commit rape (R. 138). The paradox of the trial court's position lies in the fact that it did instruct the jury with respect to the lesser included offenses of battery and simple assault

(R. 42, 43, 44). Adoption by the trial court of such a position answers, in itself, any contention which might be advanced that the evidence produced at trial was not sufficient to permit the court to instruct as to the lesser included offense of assault with intent to commit rape. Since it is a fundamental rule of law that the offense of assault with intent to commit rape is included in the charge of rape, it is unnecessary to cite the numerous authorities which so hold. *State v. Blythe, op. cit; State v. Smith, op. cit.* Furthermore, since simple assault is a lesser included offense of assault with intent to commit rape, *State v. Hyams, op. cit.* at 286, and the jury was instructed with respect to simple assault, it would of necessity follow that the evidence was sufficient to require that the trial court instruct with respect to the offense as assault with intent to commit rape.

In the case of *State v. Blythe,* 20 Utah 378, 58 P. 1108 (1899), the court stated:

> When, therefore, the defendant was charged with and tried for the completed offense of rape, it was competent for the jury as provided in section 4893, R.S. to find him guilty of assault with intent to commit rape, if in their judgment, the evidence warranted; and the court in so charging the jury committed no error, there being evidence to justfy the charge and sustain the judgment even though from the evidence the offense of rape was actually completed, the jury had the power to convict defendant of the lesser offense, however illogical such conviction may seem. *Id.* at 381.

See also *State v. Smailes,* 51 Idaho 321, 5 P. 2d 540 (1931); *People v. Babcock,* 160 Cal. 537, 117 P. 549 (1911); *People v. Parker,* 74 Cal. App. 540, 241 P. 401 (1925). Therefore, the trial judge in the instant case, by refusing to instruct the jury with respect to the offense of assault with intent to commit rape, deprived the jury of their right and power "to find the accused guilty of a lesser or included offense," and in so refusing the lower court in effect made a determination of state of the evidence as a matter of law to the prejudice of the rights of the defendant, *State v. Hyams,* 64 Utah 285, 230 P. 349 (1924).

The matter of lesser included offenses is succintly clarified and summarized by Mr. Justice Straup in *State v. Ferguson,* wherein he states that as a general rule where there is sufficient evidence to justify a conviction of a charged greater offense, there must of necessity also be sufficent evidence to justify a conviction of the included lesser offense if all the essentials of the lesser are embraced in the greater. As was noted above, assault with intent to commit rape is such an offense. Justice Straup then observes:

> In such a case the one offense is charged and presented by the indictment or information just as much as is the other. Being so charged and presented, the accused, by his plea of not guilty is put on trial for the one just as much as for the other offense and may be convicted of either. *State v. Ferguson,* 74 Utah 263, 267, 279 P. 55 (1929) (concurring).

The holdings of the above cases show that the appellant was entitled to the jury's consideration of the offense of assault with intent to commit rape under the offense charged and his plea thereto. The trial court's refusal to so instruct the jury constituted prejudicial error.

CONCLUSION

Since the trial court (1) erroneously determined the question of appellant's sanity or insanity as of April 14, 1963 as a matter of law; (2) refused to instruct the jury with respect to the element of intent as prescribed by 76-1-21, Utah Code Annotated, 1953; and (3) refused to instruct the jury as to the lesser included offense of assault with intent to commit rape, appellant asserts that such errors were prejudicial and require a reversal of the trial court's judgment and a new trial.

Respectfully submitted,

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